

FEB 14 1967

No. 20,592 /

United States Court of Appeals
For the Ninth Circuit

DANIEL A. ROBIDA,
vs.
COMMISSIONER OF INTERNAL REVENUE,
} *Petitioner,*
} *Respondent.*

PETITIONER'S OPENING BRIEF

JOHN R. SWENDESEN,
126 Post Street,
San Francisco, California 94108,
Attorney for Petitioner.

FILED

JUN 1 1966

WM. B. LUCK, CLERK

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STATEMENT OF THE CASE:**MR. ROBIDA DID NOT RECEIVE A FAIR HEARING**

1. **Commissioner's Notice of Deficiency and Assessment Was Based on Fraud and a Failure to File and on Failure to Keep Adequate Records.**

September 18, 1962, Internal Revenue Service mailed a notice, addressed to Robida at Wiesbaden, Germany, of determination of tax liability and deficiencies in tax for the years 1956 through 1961 (CT 44),¹ assessing penalties for fraud under Internal Revenue Code § 6653(b) and failure to pay on estimated income under Section 6654. Said notice advised Robida that the Government had made a jeopardy assessment in the amount of \$71,143.00. Actually, the Government seized over \$77,000.00 (RT 6, line 5). Robida filed his petition for redetermination in the Tax Court (CT 1) December 26, 1962, in Frankfurt, Germany.

In determining underpayment and arriving at the amount of income claimed to have been fraudulently concealed, IRS relied on an arbitrary increase in net worth computation and on a bank withdrawal and deposit system to show non-deductible expenditures (CT 63). The notice of September 18, 1962 recites that the jeopardy assessment and income determination was made on the basis that Robida had failed to file returns for the years in question, and on a claimed absence of adequate records (CT 45, 48, 51, 54, 57, 60).

¹Address on CT copy is not the same as original sent to Robida.

2. Commissioner Abandoned Fraud and Failure to File.

At the San Francisco hearing, October 5, 1964, Respondent IRS abandoned the issue of fraud for the first time (RT 3, line 12). At that time Respondent also abandoned its claim that Robida had not filed his returns for the years in question (RT 17, line 10).

3. Commissioner Had Robida's Records.

Robida did not have his records at the time of the San Francisco hearing (RT 17, line 10; 33, lines 14, 25; 34, line 12). They were in possession of Respondent.² His records were pertinent and important to his position and proof (RT 34, lines 11 to 22).

4. Robida's Records Were Pertinent and Important.

Among other things his records would show that disbursements from bank accounts which the IRS in their net-worth bank deposit and withdrawal computation methods relied on to prove living expenses, were actually merely transfers of money from one account to another (RT 35, line 11) or redeposits of the same money.

The Court asked Robida if he then had the bank accounts (RT 39, line 18). Robida replied that the Germans got them (RT 39, line 20). The Germans got them from the IRS (RT 34, lines 11-15).

A large part of the case turns on Robida's claim of exemption of earned income under Internal Revenue Code Section 911 as a resident of Germany (Tax Re-

²See Appendix B.

turns—CT 68, 74, 81, 86, 93, 98). Respondent knew he was such resident (RT 24, line 13), and while the IRS retained his records, the Court required him to prove his absence (RT 24, line 20).

5. Harassment.

In 1963, after the deficiency notice of September 18, 1962, Robida was imprisoned in Germany on false charges and was prevented from getting a hearing (RT 33, line 10). The charges were dropped (RT 57, lines 3, 17). Respondent knew of the false charges (RT 82, lines 6-18) and knew that Air Force Generals forced Robida to give a demonstration of his skill in manipulating slot machines (RT 62, lines 7-13).

During all of this time and up to the time of the hearing, Robida's records and other property were in possession of the Government and German officials acting in concert (RT 63, line 25, to 65, line 8; RT 88, lines 7-9). On May 13, 1966, after Notice of Appeal, Respondent sent copies of some of said records to John R. Swendsen, attorney for Mr. Robida. A copy of the forwarding letter is attached hereto as Appendix B.

Mr. Ciranni, counsel for IRS, shows that the Respondent knows that they have Robida's records and other property, as appears from the following questions by Mr. Ciranni and answers by Mr. Robida at page 64 of the reporter's transcript, at line 14, to page 65, line 8:

“Q. Did you get your property back?

A. No. I have got nothing back. I got a few papers from the American Consul, a few old newspapers and maps and letters.

Q. They are still holding your car?

A. That is correct.

Q. And your typewriter?

A. That's right.

Q. And \$3500 in cash?

A. Well, I think you have the complete list of what they are holding.

Q. \$911.00 of that was in nickels, dimes and quarters?

A. It is possible.

Q. Do you deny it?

A. I said it is possible.

Q. Which was taken from your possession?

A. It is quite possible, I didn't see them take it. They didn't give me the honor of allowing — permitting me to watch and search my car. Whatever they say, you have got the report. I won't dispute it.”

The respondent also knew and had records of the falseness of the charges which resulted in Mr. Robida's incarceration in Germany, as appears from the following questions by the Court and answers by Mr. Robida at page 56 of the transcript, line 7 to page 57, line 5:

“The Court: Well, the Court doesn't know anything about that, Mr. Robida.

Is your question whether he was ever convicted involving moral turpitude?

Mr. Ciranni: Yes, your Honor.

By Mr. Ciranni:

Q. What was the result of these charges?

Mr. Ciranni: I know the answer.

The Court: Well, I don't.

Were you ever convicted of any charge, Mr. Robida? Would you be willing to tell the Court the nature of the conviction, if any, because I don't know? Do you have any reason to hide it? If so, I will listen to that.

The Witness: I am willing to go into that, too. I have nothing to be ashamed of, but on the other hand the respondent has considerable records of what took place.

They made a charge of larceny, true, and I objected to the charge and they knew it was false when they made it. The Americans knew it was false and the Germans knew it was false.

The Court: Were you ever convicted of it?

The Witness: The charge was dropped. There was a newspaper article that was written that was vicious. These charges——"

It is significant that the respondent did not attempt to refute or deny Mr. Robida's charges (see RT 81, line 17, to RT 82, line 18), but vilified him by the introduction of innuendoes of false charges.

See page 57 of the transcript, line 11, to page 58, line 15:

"By Mr. Ciranni:

Q. The specific question I asked is what was the result of these charges?

A. What charges?

Q. The charges on which you were arrested in Germany in July of '63?

A. They were false charges and they were dropped.

Q. Were not you deported from Germany?

A. I object to that because it is false. You are going, apparently, on the basis of a vicious and malicious newspaper article.

The Court: Were you deported?

The Witness: No, your Honor. This requires a hearing in a Court of Law to be deported. They refused to grant me a hearing against my rights in any respect. The law they were going on was a law during 1938 back in Hitler's days.

Most of those laws were repealed by the Occupation.

By Mr. Ciranni:

Q. You were expelled from the country but not deported?

A. It was not effective—for instance, I was not escorted outside of Germany. I was escorted to the train.

Q. You were expelled to Switzerland?

A. To any country I wanted to go. I was not limited as to which country. This was a law that was passed in 1938.

Q. You were expelled from Germany as a result of these charges?

A. No, I wasn't. If you want to know you should ask the Germans because they did this themselves. They are very particular about giving reasons as to why they do something. They were in conspiracy with the American Agents."

THE BURDEN OF PROOF WAS ON THE COMMISSIONER TO SHOW THAT THE DETERMINATION OF TAX LIABILITY WAS CORRECT.

1. Respondent Had Petitioner's Records.

There is a strong presumption that missing records, if produced, would be against the interest of those responsible for their loss. *Rosen v. U.S.*, 15 AFTR 501.

That presumption is as strong against the government as it is against the taxpayer, and perhaps stronger. *U.S. v. Heath*, 147 F. Supp. 877, 51 AFTR 630; (Affirmed 9th Cir., 1958 in 2 AFTR 5627, 260 F.2d 623.)

The principle of the *Heath* case is peculiarly applicable here. The government, having Mr. Robida's records and joining or appearing to join in false charges against him, resulting in unwarranted and unjust incarceration, charges him with fraud and failure to file returns, both charges susceptible to criminal action, assesses fraud penalties against him, seizes his money, and expects him to present a proper case on the non-fraud aspects of the case, while they retain his records.

2. The Commissioner Having Failed to Prove Fraud, Had the Burden of Pleading and Proving the Applicability of the Six Year Statute of Limitations.

The September 18, 1962, notice of determination of Tax and Assessment covered the years 1956 through 1961 (CT 43-62).

Internal Revenue Code Section 6501 provides that the amount of any tax imposed by this title shall

be assessed within three years after the return was filed.

Mr. Robida's returns for the years in question were filed as follows:

Year	Return Filed	Three Year Period Expired
1956	March 1957	March 1960 (CT 64)
1957	March 1958	March 1961 (CT 70)
1958	March 1959	March 1962 (CT 77)
1959	March 1960	March 1963 (CT 84)
1960	March 1961	March 1964 (CT 91)
1961	March 1962	March 1965 (CT 96)

Obviously, the statutory period of three years had run as to years 1956, 1957 and 1958.

Internal Revenue Code Section 6501(e) provides for a six year limitation period where the taxpayer omits from gross income an amount properly includable in excess of 25 per cent of the amount of gross income stated in the return. IRC Section 6501 (e)(iii) provides that in determining the amount omitted, there shall not be taken into account any amount disclosed in the return or in a statement attached to the return.

In claiming exemptions under IRC 911, Mr. Robida disclosed the sums which the Commissioner now seeks to disallow as exempt.

Where the Commissioner seeks to extend the statute of limitations, the burden of pleading and proof is on him. *C. A. Reis* (1942), 1 TC 9, 12; affirmed (CCA-6), 142 F.2d 900.

The Commissioner cannot meet this burden by merely introducing in evidence the notice of determi-

nation and assessment. See: *John Lima* (1952), 11 TCM 1114; *Marvin Berry* (1952), 11 TCM 301.

In the instant case the Commissioner produced no evidence other than his deficiency notice.

3. The Commissioner Abandoned His Formal Notice of Deficiency.

The September 18, 1962 Notice of Deficiency and Assessment was based on inadequacy of Robida's records, failure to file and fraud. At the hearing in the Tax Court, the Commissioner abandoned the claims of fraud and failure to file. Since the Commissioner had Robida's records and did not produce them, he also abandoned that ground. He therefore substantially abandoned all of the grounds of the assessment and deficiency notice and relied on different grounds.

Where the Commissioner relies on different legal grounds at the hearing, he is considered to have abandoned his deficiency notice. *Leon Papineow*, 28 TC 54; *Thomas Wilson*, 25 TC 1058; *Edmund Thomas Gulledge, Sr. v. Commissioner*, 249 F.2d 225, 52 AFTR 731.

When the Commissioner abandons a formal notice of deficiency, the burden is on him to prove his contentions. *Tex-Penn Oil Co. v. Commissioner* (3 Cir.) 83 F.2d 518.

**THE COMMISSIONER'S NET WORTH CALCULATION
IS NOT SUFFICIENT.**

The Commissioner's net worth calculation (CT 63; 132) purports to be based on an opening net worth at December 31, 1955 of \$57,292.77. Nowhere in that calculation does there appear an item of cash on hand. As appears from Mr. Ciranni's questioning of Mr. Robida (RT 64-65, *supra*), Mr. Robida might well have had appreciable amounts of cash on hand at any time. The net worth calculation does not take into account automobiles or other items of personal property.

A definite opening net worth must be established by the Government. *U.S. v. Eley*, 11 AFTR 2d 711.

The Commissioner, having Mr. Robida's records, certainly could have tracked down relevant leads that might have shown that Mr. Robida's net worth December 31, 1955, was in excess of the amount fastened upon.

It was incumbent on the Commissioner to do that. *Holland v. U.S.* (1954), 348 U.S. 121, 75 S.Ct. 127.

CONCLUSION

It is respectfully submitted that the Tax Court's decision was based upon a grossly unfair hearing. Mr. Robida, being charged with fraud and failure to file his returns; being subjected to imprisonment on false charges after the Commissioner made his jeopardy assessment; being subjected at the hearing before the Tax Court to a sudden switch in the rules; being

cross-examined as to scurrilous and unfounded imputations; being deprived of his records; could not possibly have presented a proper case for himself. No future trial could possibly be fair. Mere production of some, or even all, of his records at this late date, having been in hostile hands since 1962, would not put him in a position to defend himself against now admittedly false charges. He could not now rely on such records to sustain any burden of proof he might have on 'civil' or non-fraud matters.

It is respectfully urged that the Commissioner, having Mr. Robida's records and failing to produce them, had no proper entitlement to rely on a net worth calculation, nor on a bank withdrawal system, or any other system, to show tax liability on the part of Mr. Robida, other than reliance on Mr. Robida's records, without first showing that such records were inadequate.

The Commissioner having gone out of his way to throw the burden of proof on himself, failed to sustain it.

No rule or statute can or should operate to prevent this Honorable Court from doing substantial justice.

If Mr. Robida did not make a formal demand upon the Commissioner for production of his records, the transcript of the proceedings before the Tax Court is full of Mr. Robida's unheeded complaints that the Commissioner has his records. Under such circumstances, the principle announced in *U.S. v. Heath* (1958) (9th Cir.) 260 F.2d 623, at page 632, should apply.

"It is established principle that all the authority of Courts to do justice is not encompassed either by rules or statutes. Nor is the power of a Court to prevent injustice circumscribed by their language."

PRAYER

Wherefore, petitioner prays that the decision of the Tax Court be reversed and that the Commissioner be required to accept Mr. Robida's reports as filed for the affected years; that the Commissioner be ordered to return to Mr. Robida the monies seized by way of jeopardy assessment, plus interest; that costs of suit be awarded Petitioner, and that such further and other orders be made as shall seem to the Court to be meet and just.

Dated, San Francisco, California,
June 13, 1966.

JOHN R. SWENDESEN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN R. SWENDSEN,

Attorney for Petitioner.

(Appendices A and B Follow)

Appendices A and B



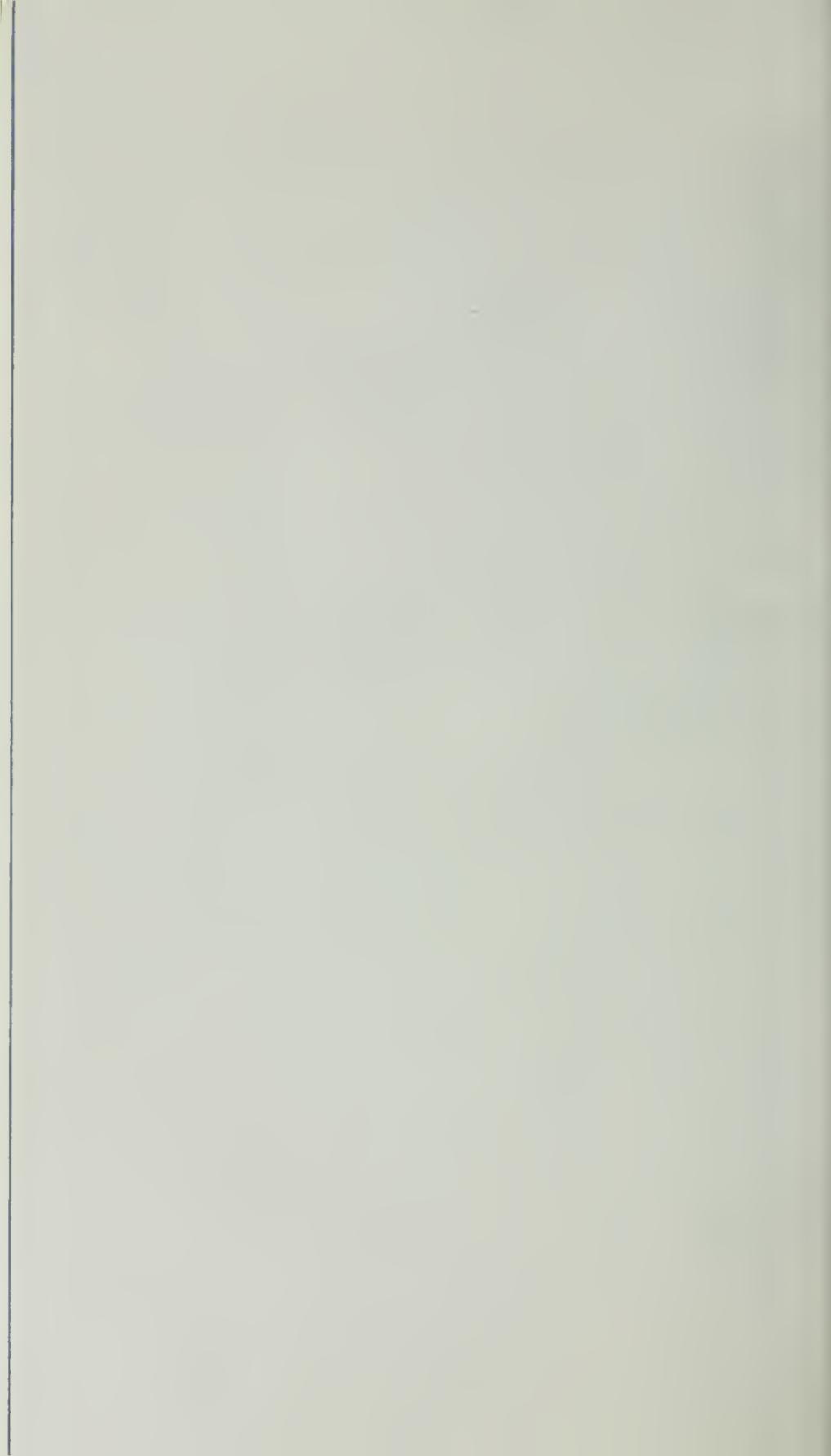
Appendix A

EXHIBITS OFFERED AND RECEIVED:

	For Identification	In Evidence
Respondent's Exhibit A	RT 40	RT 41
Respondent's Exhibits B through G	RT 41	RT 42
Respondent's Exhibit H	RT 42	RT 43
Petitioner's Exhibit No. 1	RT 68	RT 68
Petitioner's Exhibit No. 2	RT 77	RT 77

PETITIONER'S EXHIBITS OFFERED AND REFUSED:

	Offered	Refused
Letter from Morris Plan	RT 77	RT 78
Letter from William G. Binder	RT 79	RT 80
Letter from Senator Frank Kowalski	RT 79	RT 80
U.S. Government Employee records	RT 81	RT 82



APPENDIX B



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

May 13, 1966

Address Reply to the
Division Indicated
and Refer to Initials and Number

MR:LAJ:CRJust:kas
5-11504

AIR MAIL SPECIAL DELIVERY
RETURN RECEIPT REQUESTED

John R. Swendsen, Esq.
126 Post Street, Suite 600
San Francisco, California

Re: Daniel A. Robida v. Commissioner
(C.A. 9th - No. 20,592)

Dear Mr. Swendsen:

We are enclosing, for your information and for whatever you deem desirable, copies of records turned over to the Revenue Service. As you know, they are not a part of the in this appeal.

Sincerely yours,

RICHARD M. ROBERTS
Acting Assistant Attorney
Tax Division

By: *Lee A. Jackson*
LEE A. JACKSON
Chief, Appellate Section

Enclosure

